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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 658.

MAX SENIOR,

Appellant,

vs.

GEORGE C. BRADEN, QUINCY A. DAVIS, CARLTON S. DARGUSCH, AND ANTHONY J. KRAUS, CONSTITUTING THE TAX COMMISSION OF OHIO; ROBERT HEUCK, AS AUDITOR OF HAMILTON COUNTY, OHIO; AND HARRY A. FREIBERG, AS TREASURER OF HAMILTON COUNTY, OHIO,

Appellees.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

On January 1, 1932, Max Senior, the appellant, a citizen and resident of the city of Cincinnati, Hamilton county, Ohio, was one of the beneficiaries under certain declarations of trust, and as such received at various

times during the calendar year 1931 cash distributions of income thereon, as set forth in his petition (R., 43), as follows:

Description	Interest	Income Yield
Lincoln Inn Court, Cincinnati Ohio,	340/1275ths	$1,445.04
Clark-Randolph Building Site, Chicago, Illinois	5/3250ths	262.50
Woman's City Club, Cincinnati, Ohio	5/1000ths	10.00
Rockefeller Building, Cleveland, Ohio	2/1400ths	120.00
Insurance Exchange Building, Boston, Massachusetts	1/1900ths	13.75
City National Bank Building, Omaha, Nebraska	5/1000ths	275.00
Fidelity Mortgage Company, Cleveland, Ohio	7/1050ths	105.00

At the time of the filing of the petition in this case, Section 5328-1 of the General Code of Ohio (114 Ohio Laws, 717, 718) provided that the investments of persons residing in the state of Ohio should be subject to taxation;[1] Section 5323 (id. 715) defined the term "investments" so as to include incorporeal rights of a pecu-

[1] "Sec. 5328-1. All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; * * *" (For Sec. 5328-1 in full see page 63, this brief.)

niary nature from which income is or may be derived, however evidenced, including equitable interests divided into shares evidenced by transferable certificates;[3] Section 5638 (id. 722) imposed a tax upon productive investments at the rate of five per centum of their income yield;[4] and Section 5389 (id 721, 722) defined the term "income yield" as the aggregate amount paid as income by the trustee to the beneficiary of an investment held in trust, whether including the taxpayer or not, during the taxable year.[5]

In filing his return for the year 1932 with the county auditor of Hamilton county, Ohio, the appellant disclosed but did not list for taxation therein his interest in the several trusts referred to in his petition (R., 43) according to its income yield as required by the statute; on the contrary, he refused to include that interest in his re-

[3] "Sec. 5323. * * * Annuities, royalties and other contractural obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in lands and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates and (3) employment and partnership contracts and salaries and wages derived therefrom." (For Sec. 5323 in full see page 61, this brief.)

[4] "Sec. 5638. For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to-wit: investments, five per centum of income yield; * * *" (For Sec. 5638 in full see page 70, this brief.)

[5] "Sec. 5389. * * * 'Income yield' as used in Section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following: * * * in the case of equitable interests, the cash distributions of income so made. * * *" (For Sec. 5389 in full see page 68, this brief.)

turn on the theory that the sections of the General Code of Ohio heretofore referred to were and are unconstitutional in that they offend the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States,* and Article I, Section 16, and Article XII, Sections 2 and 5 of the Constitution of the state of Ohio.* (R., 45, 46.) Further, in order to prevent the county auditor of Hamilton county, Ohio, from proceeding to make an assessment against him with respect to his interest in the several trusts, measured by the distribution of income made to and received by him in accordance with the terms of the declarations of trust creating them, appellant filed a petition in the Court of Common Pleas of Hamilton county, Ohio, (R., 42), praying that court to declare Section 5323 of the General Code of Ohio, in so far as it purported to subject that interest to taxation, unconstitutional and void and to restrain the appellees from "assessing or collecting or attempting to assess or collect from plaintiff (appellant) the Ohio intangible property tax on plaintiff's (appellant's) said equitable interests * * *."

" * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (For the Fourteenth Amendment in full, see page 72, this brief.)

*Article I, Section 16, of the Constitution of the state of Ohio, reads, in part, as follows: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Article XII, Section 2, reads in part as follows: "* * * Land and improvements thereon shall be taxed by uniform rule according to value. * * *"

Article XII, Section 5, reads as follows: "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

(R., 46.) The appellees thereupon admitted that unless otherwise restrained they would assess and proceed to collect the tax upon appellant's interest in the several trusts as the statute required them to do, and for further answer denied each and every allegation of the petition, at the same time praying that the petition of the appellant be dismissed. (R., 48.)

In this manner the petition and answer raised an issue involving the application of Sections 5323, 5328-1, 5638, and 5389 of the General Code of Ohio to the interest of the appellant in the several trusts, and the constitutionality of Section 5323 as so applied, under the provisions of the federal and state constitutions.

The Court of Common Pleas, Hamilton county, Ohio, held for the appellant. *Senior v. Braden, et al.*, 30 Ohio Nisi Prius (New Series) 147 (1933). Appellees thereupon moved for a new trial (R., 53), which motion was overruled (R., 53, 54); but upon a petition in error to the Court of Appeals, First Appellate District of Ohio (R., 12, 13), the judgment of the Court of Common Pleas was reversed and judgment was ordered to be entered for the appellees. *Braden et al., v. Senior*, 48 Ohio App., 255, (1934), (R., 157-166, where the opinion is reprinted in full). Appellant then applied for a rehearing (R., 14), which was denied (R., 34), and upon a petition in error claiming constitutional questions (R., 1), the Supreme Court of Ohio affirmed the judgment of the Court of Appeals of the First Appellate District of Ohio. *Senior v. Braden, et al.*, 128 Ohio St., 597, (1934), (R., 168-180, where the opinion is reprinted in full). The case is now before this court upon an appeal from the Supreme Court of Ohio (R., 180).

THE PROBLEMS OF THE CASE.

The problems presented in this case are:

(1) Is the question presented, a federal question for the Supreme Court of the United States to consider?

(2) Has the state of Ohio power to tax the interest of the appellant in the several trusts referred to in his petition (R., 43); and, if so,

(3) Has that power been exercised by the General Assembly of Ohio in conformity with the provisions of the federal and state constitutions?

THE ARGUMENT OF THE APPELLEES.

In general, the argument of the appellees will show:

I.

That the determination of appellant's interest is purely a state question, not involving any violation of the Constitution of the United States, and therefore not subject to review by the Supreme Court of the United States.

II.

(a) That the state of Ohio has the power to tax intangible *personal property*, including *equitable choses in action*, owned by its citizens and residents;

(b) That *the interest of the appellant* in the various trusts referred to in the record *is a species of intangible personal property* comprised in a bundle of equitable choses in action, and not as the appellant alleges an equitable interest in land; and, therefore,

(c) That the interest of the appellant in the various trusts is within the power of the state of Ohio to tax.

III.

That the tax laid by the state of Ohio upon the intangible personal property of the appellant has been imposed in conformity with the provisions of the federal and state Constitutions.

I.

THERE IS NO FEDERAL QUESTION PRESENTED FOR THE SUPREME COURT OF UNITED STATES TO CONSIDER.

Appellant's brief discloses that the ground upon which the appellant relies to sustain the appellate jurisdiction of the Supreme Court of the United States is that the state of Ohio by virtue of Section 5323 of the General Code of Ohio is attempting to assess and collect taxes upon land or an interest in land in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. The syllabus of the opinion of the Supreme Court of Ohio shows that that court held that the interest of the appellant in the several trust estates referred to in the record in this case is not land or an interest in land but consists of a bundle of equitable choses in action, viz: rights to participate in the net rental of the real estate being administered by the respective trusts, as to the taxation of which constitutional limitations upon the power to tax land or interests therein have no application.

Inasmuch as the determination of the nature of the interest of the appellant in the several trust estates is purely a question of local law, the decision of the Supreme Court of Ohio is not reviewable by the Supreme Court of the United States.

Moffitt v. Kelly, 218 U. S., 400, 403, (1910);
Iowa Central Railway v. Iowa, 160 U. S., 389, 393, (1896);
Castillo v. *McConnico*, 168 U. S., 674, 683, (1898);
Lombard v. West Chicago Park Commissioners, 181 U. S., 33, 43, 507, (1901);
French v. Taylor, 199 U. S., 274, 277, (1906);
Rawlins v. Georgia, 201 U. S., 638, 639-640, (1906);
Hart v. Smith, 203 U. S., 129, (1906);
Hannis Distilling Company v. Mayor and City Council of Baltimore, 216 U. S., 285, 294, (1910);
McDonald v. Oregon Railroad and Navigation Company, 233 U. S., 665, 669-670, (1914);
St. Louis and Kansas City Land Company v. Kansas City, 241 U. S., 419, 427, (1916);
Gasquet v. La Peyre, 242 U. S., 367, (1917);
Nickel, et al., v. Cole, 256 U. S., 222, 225, (1921).

A decision of a state court resting upon the construction and not upon the validity, of a statute of the state does not present a federal question.

Grand Gulf R. and B. Co. v. Marshall, 12 How., 165, (1851);
Ferry v. King County, 141 U. S., 668, (1891);
Snell v. Chicago, 152 U. S., 191, (1894).

The construction of a state statute by the highest court of the state must be accepted by the Supreme Court

of the United States when testing the validity of the statute under the Constitution of the Unied States.

Quong Ham Wah Co. v. Industrial Accident Commission of California, 255 U. S., 445, (1921).

The facts in the case of *Moffitt v. Kelly*, supra, were as follows: James Moffitt was married in California in the year 1863 and there resided with his wife until his death, in 1906. He left a large amount of property, all of which formed part of the community which existed between himself and his wife. Moffitt disposed of his estate to his wife and children, by will in the same proportions as if he had died intestate. It was held by the Probate Court that the interest of the widow in the community property of herself and her deceased husband was subject to be taxed under a law of California of 1905, which taxed all property passing by will and in case of intestacy from any person who died seized or possessed of the same. A tax was thereupon assessed against Mrs. Moffitt's one-half interest in the estate and an order was entered directing payment thereof by the executor. An appeal was taken to the Supreme Court of California.

The single question presented by the appeal, as stated in the opinion of the Supreme Court, was "whether the surviving wife's share of community property is subject to this inheritance tax?" The question was answered in the affirmative. In an opinion denying an application for rehearing, the court also adversely disposed of the

contention that the enforcement of the tax would violate the contract clause or the equal protection and due process clauses of the Constitution of the United States. 153 California, 359. The case was then brought to this court. This court, in affirming the decision of the Supreme Court of California, said:

> "It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the state of California has imposed an inheritance tax upon the share of the wife in the community, and thereby taxed her as an heir of her husband, when, if the laws existing at the time of the celebration of the marriage be properly construed, and be held to be contractual, she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property was deferred, and arose only on his death. But, for the purpose of enforcing the Constitution of the United States, we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because, in determining whether the imposition of the tax complained of violated the Constitution of the United States, we are solely confined to considering whether the state had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's right of possession and enjoyment, arising upon the death of her husband, was subject to be taxed by the state, so far as the Constitution of the United

States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern. To make this, if possible, clearer by an illustration, we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that, on an analysis of the Constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Mofflitts, we should conclude that the nature and character of the rights of the wife in the community property, if correctly interpreted, were such that, on the death of the husband, the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration. This would be the case, because, as there was state power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely state question, not involving any violation of the Constitution of the United States, and which therefore we have no right to review."

The case of *Nickel, et al., v. Cole*, supra, was a suit brought by the comptroller of Nevada to collect a transfer tax alleged to be due under a statute of Nevada, approved on March 26, 1913, to take effect thirty days from that date. The facts were these:

Miller, a resident of California, was the owner of a number of shares of stock of a Nevada corporation. On April 17, 1913, after the above-mentioned statute had been passed, but before it went into operation, Miller in California, made a will, and at the same time a deed of

trust, conveying his stock to Nickel, et al., in trust for himself for life, and after his death, upon limitations similar to those in the will,—any payment under the will to be in satisfaction of the provisions both in the will and in the deed. The deed contained no power of revocation, the stock was endorsed and delivered to the trustees, and thereafter was retained by them. Miller died on October 14, 1916. Under the provisions of said statute, a tax was imposed upon the transfer of all property which passed in trust or otherwise by will or by statutes of inheritance or by deed or gift made without valuable and adequate consideration, in contemplation of the death of the grantor or the donor, or to take effect in possession or enjoyment at or after such death.

It was contended by those who took upon Miller's death, that their interest vested when the deed was delivered and the statute did not apply. The Supreme Court of Nevada seems to have conceded that if their interest was vested when the deed was delivered, the statute perhaps could not apply. However, they reached the result by holding that the execution of the deed and will was one transaction, and gave no vested right until Miller's death. Thereupon, it was declared by those who took that the above limitation to the statute being admitted, the said court could not find the supposed constitutional difficulty by assuming a view of the instrument that is deemed to be plainly untenable and contrary to the law of California where the parties lived and the

transfer made. In affirming the judgment of the Supreme Court of Nevada, this court stated:

> "But the answer to this is that when, as here, there can be no pretense that the court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this court accepts the decision, whether right or wrong.
>
> *Enterprise Irrig. Dis. v. Farmers Mut. Canal Co.*, 243 U. S., 157.

> And when, as here, the statute unquestionably might have made the tax applicable to the transfer, we do not inquire very curiously into the reasoning by which the statute is held to justify the tax. 'As there was state power to tax * * * the question whether or not the interest under the circumstances was correctly subjected to the tax was a purely state question.'"

The questions presented in the instant case fall directly within the principle of *Moffitt v. Kelly* and *Nickel, et al., v. Cole*, supra. In each of said cases, the court stated that "when there was state power to tax, the question whether or not the interest under the circumstances was correctly subjected to the tax, was purely a state question."

In the matter before us, the issues presented to the Supreme Court of Ohio, were:

1. What is the interest of the appellant?

2. Is appellant's interest subject to tax under the statutes of Ohio?

Having determined the appellant's interest in the va-

rious trust estates is not an interest in land, but merely an intangible right, the court then held that such interest is taxable, notwithstanding the fact that the particular real estate out of which such intangible right issues, is likewise taxed.

So regarded, it is not contended by appellant that the state of Ohio has no power to tax his interest. The appellant, however, proceeds upon the assumption that his interest which is being subjected to taxation, is an interest in real estate and not an intangible right. The premise upon which his argument with reference to discrimination is based, is that his interest is an interest in land. Authorities cited by him deal with taxation of land and tangible personal property and consequently are irrelevant.

It is therefore respectfully submitted that *the determination of the Supreme Court of Ohio that the interest of the appellant in the several trust estates is an intangible right within the purview of Section 5323 of the General Code of Ohio, was the determination of purely a state question and the nature of appellant's interest in the several trust estates is not reviewable by this court.*

II.

THE POWER TO TAX: JURISDICTION UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The power to tax is one of the attributes of sovereignty and jurisdiction to exercise the power is coterminous with the territorial boundaries of the sovereign which seeks to impose the tax.

(a) Jurisdiction to Tax Tangible Property.

In the case of land, the rule that the power to tax extends only to land situate within the borders of the taxing state has never been questioned. *State Tax on Foreign-held Bonds*, 15 Wallace (U. S.), 300, 319 (1872); *Union Refrigerator Transit Company v. Kentucky*, 199 U. S., 194, 204 (1905). The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction of the taxing state, and, consequently, the rule is that such property is subject to taxation in the state where it is permanently located, irrespective of the place of the domicile of its owner. *Union Refrigerator Transit Company v. Kentucky*, supra; *Old Dominion S. S. Company v. Virginia*, 198 U. S., 299, 305 (1905). Where, however, tangible personal property has not acquired a *situs* of its own, it is taxable at the *domicile* of its owner. *Southern Pacific Company v. Kentucky*, 222 U. S., 63 (1911).

(b) **Jurisdiction to Tax Intangible Personal Property.**

In the case of *intangible* personal property, however, considerations applicable to ownership of physical objects are obviously inapplicable, and taxation of such property at the place of domicile of the owner has been uniformly upheld. *State Tax on Foreign-held Bonds*, supra; *Kirtland v. Hotchkiss*, 100 U. S., 491 (1879); *Fidelity & Columbia Trust Company v. Louisville*, 245 U. S., 54, 58 (1917); *Blodgett v. Silberman*, 277 U. S., 1, 15 (1928); *Maguire v. Trefry*, 253 U. S., 12, 17 (1920); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S., 276, 280 (1932); compare *Farmers Loan & Trust Company v. Minnesota*, 280 U. S., 204 (1930); *First National Bank of Boston v. Maine*, 284 U. S., 312 (1932).

In *Kirtland v. Hotchkiss*, supra, where the question whether or not the state of Connecticut had power to tax the property of one of its citizens represented by certain bonds evidencing a debt owing to him by a citizen of the state of Illinois was involved, this court, at page 498, said:

> "The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same state, to contribute for the support of the government whose protection he enjoys.
>
> "That debt, although a species of intangible prop-

> erty, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt —the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign-held Bonds* (supra), the right of the creditor 'to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, • • • has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein,' etc. Cooley on Taxation, 15, 63, 134, 270. The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the state."

The cases heretofore cited have dealt with the power of a state to tax debts, claims, rights, etc., i. e., choses in action of a *legal* nature. However, in cases where the subject of the tax is an *equitable* chose in action or claim, the same principles have been applied. Thus, in *Maguire v. Trefry*, supra, where the question was presented as to the power of the state of Massachusetts to tax a resident beneficiary of a foreign-held trust, this court, at page 16, said:

> "It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and

interest distinct from its legal ownership. 'The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others.' 2 Story's Equity, 11th Ed., § 964. It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts.

"The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the State. *The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the State which are held taxable at the domicile of the owner. Kirtland v. Hotchkiss*, 100 U. S. 491." (Italics added.)

It is, therefore, respectfully submitted that under the decision of this Court *intangible personal property in the nature of choses in action, whether legal or equitable belonging to residents of the state of Ohio, is subject to the power of that state to tax, irrespective of the place of domicile or residence of the obligor or obligors, in so far as the due process clause of the Fourteenth Amendment to the Constitution of the United States is concerned.*

III.

THE POWER TO TAX: JURISDICTION UNDER ARTICLE XII, SECTION 2, OF THE CONSTITUTION OF OHIO.

In the state of Ohio, the power to tax is an attribute of sovereignty included in the general legislative power conferred by Article II, Section 1, of the Constitution of Ohio upon the General Assembly, and is plenary with respect to all property situate within the borders of the state, except that in the case of land, it must under Article XII, Section 2, of the Constitution of Ohio, be taxed by uniform rule according to value.[1] Accordingly, the power of the General Assembly of Ohio to select intangible personal property, including equitable choses in action, belonging to its citizens and residents as the subject of taxation is unlimited, and may be exercised as it sees fit, as long as the manner of its exercise discloses no arbitrary discrimination.

[1] See paragraph two, note 6.

IV

THE POWER TO TAX: CONCLUSIONS.

In the light of the foregoing discussion, it may be candidly admitted that under the Fourteenth Amendment to the Constitution of the United States, the state of Ohio has no power to tax land or interests in land situate beyond its borders; nor has it power to tax land or interests in land situate within the state in any other manner than by uniform rule according to value, under Article XII, Section 2, of the Constitution of Ohio. From this it follows as a matter of course that if the property of the appellant which the appellees seek to tax in this case is land or an interest in land, situate within or without the state, their action is unconstitutional and should be permanently enjoined. *If, however, the property of the appellant in the several trusts is unequivocally shown by the record in this case to be in fact a species of intangible personal property in the nature of a bundle of equitable choses in action, then the state of Ohio has the power to impose the tax which the appellees, pursuant to provisions of the General Code of Ohio, have sought to do, without offending either the due process clause of the Fourteenth Amendment to the Constitution of the United States, or Article XII, Section 2, of the Constitution of the state of Ohio.*

With the law of the case dealing with jurisdiction to tax thus established, it is at once apparent that its *major*

problem is to determine the nature of the interest of the appellant in the several trusts, since constitutional limitations which restrict the power of the state of Ohio to tax land or interests therein have no application to the taxation of intangible personal property. The appellant holds and enjoys his interest under various agreements and declarations of trust which have been introduced in evidence and made a part of the record in this case (R., 65-140). These documents disclose that his interest in each trust now before this Court is by nature an equitable chose in action, as, it is submitted, the analysis now to be made will show.

V.

ANAYLSIS OF THE NATURE OF THE INTEREST OF THE APPELLANT IN THE SEVERAL TRUSTS AS DISCLOSED BY THE AGREEMENTS AND DECLARATIONS OF TRUST INTRODUCED BY HIM IN EVIDENCE.

Although there are seven distinct trusts involved in this case, in general the agreements and declarations of trust in all of them follow parallel lines; and for this reason counsel for the respective parties have agreed (R., 183-184) that the decision of this Court with respect to the taxation of the appellant's interest in the trust evidenced by certificate marked Exhibit 2 (R., 67), shall be applied to the taxation of his other interests in those trusts in which real estate situated outside the state of

Ohio comprises the corpus thereof; and that the decision of this Court with respect to the taxation of his interest in the trust evidenced by certificate marked Exhibit 7 (R., 75) shall be applied to the taxation of his other interests in those trusts in which real estate situated within the state of Ohio comprises the corpus thereof, excluding his interest in the Lincoln Inn Court Trust, evidenced by certificate marked Exhibit 1 (R., 65), the declaration of trust of which (R., 82) will be considered separately in this brief.

(a) **Analysis of the Clark-Randolph Building Site Trust (Exhibit 10, R., 94).**

On March 15, 1928 (effective as of March 1, 1928), William G. Pohl and his wife Cecelia Pohl, conveyed to the Chicago Title and Trust Company, of Chicago, Illinois, certain premises known as the Clark-Randolph Building site, situate in Chicago, Illinois, subject to a lease by which Pohl had demised to one Leo M. Sage a term of ninety-nine years, renewable, at the option of the lessee, for one additional like term, in consideration of the lessee's promise, *inter alia*, to pay a stipulated rental. Simultaneously with the execution and delivery of the deed, the trust company and Pohl, acting for himself and such persons, partnerships, associations, and/or corporations as might thereafter become parties thereto by acceptance of certificates of equitable ownership, entered into an agreement and declaration of trust by which the trust company, as trustee, agreed to hold the title to the

Clark-Randolph Building site, acquired from Pohl, in trust for the use and benefit of Pohl and all future holders of certificates of equitable ownership, it being agreed that all such certificates should be issued to Pohl in consideration of the conveyance by him and his wife of the Clark-Randolph Building site to the trust company. Thereafter, appellant acquired a 5/3250ths equitable interest in the trust and it is this interest (held by appellant on January 1, 1932) which the appellees seek to tax as an investment under the provisions of Sections 5323, 5328-1, 5638, and 5389 of the General Code of Ohio.

The certificate held by the appellant which evidences his interest in the Clark-Randolph Building site trust does not fully disclose the nature of that interest. On the contrary, it expressly provides, in part, as follows:

> "All of said Certificates are issued or are to be issued under and in pursuance of an Agreement and Declaration of Trust * * * to which Declaration reference is hereby made for a statement of the rights and title of the holders of this Certificate and of all other certificates issued under the Declaration, in said property, and of the terms and conditions of said trust." (R., 68.)

Accordingly, recourse must be had to the agreement and declaration of trust, where the following terms and conditions, decisive of the issue now under consideration by this Court, may be found:

(1) **Duties of the Trustee and Rights of the Beneficiaries During the Continuance of the Trust Agreement.**

(i) "*Article I.* The Trustee hereby agrees that it will hold as Trustee upon the trusts hereinafter set forth, for the use and benefit of all present and future holders of the Certificates of Equitable Ownership issued hereunder * * * the title acquired by the Trustee by a certain deed dated as of March 1, 1928, * * * to the following described premises situated in the City of Chicago, County of Cook, and State of Illinois, and bounded and described as follows, to wit: Lots Five (5) and Six (6) in Block Thirty-five (35) in the Original Town of Chicago." (Reprinted in full, R., 95.)

(ii) "*Article III. The Trustee agrees that * * * it will distribute among the Beneficiaries* * * in proportion to their respective interests as evidenced by Certificates issued hereunder and at the time outstanding, all *the net proceeds of rentals* which may be *received* by it under the terms of the Lease. * * *." (Italics added) (Reprinted in full, R., 98).

(2) **Duties of the Trustee and Rights of the Beneficiaries Upon the Termination of the Trust by Act of the Parties.**

(i) "*Article IV.* Section 1. * * * *Upon the exercise by the Lessee of the option to purchase the Trust Estate, the Trustee,* upon receipt of the option price * * * *shall distribute the net proceeds among the Beneficiaries* holding outstanding certificates * * * in accordance with the respective interests held by them as evidenced by their several certificates, and upon their surrender thereof. Thereupon, all certificates so surrendered * * * shall

be cancelled by the Trustee, * * *." (Italics added) (Reprinted in full, R., 100).

(ii) "*Article IV.* Section 2. *Upon the sale by the Trustee of the entire property comprising the Trust Estate,* pursuant to and *because of a default by the Lessee* in any of the provisions of the lease, *the Trustee,* upon receipt of the sale price * * * *shall distribute the net proceeds of such sale* * * * *among the Beneficiaries* holding outstanding certificates * * * in accordance with the respective interests held by them as evidenced by their several certificates and upon their surrender thereof. Thereupon all certificates so surrendered * * * shall be canceled by the Trustee." (Italics added) (Reprinted in full, R., 100, 101).

(iii) "*Article IV.* Section 6. The shares of equitable ownership represented by Land Trust Certificates issued hereunder are subject to call purchase by the Trustee, at the request of the Lessee, * * * at the call purchase price * * * and upon the date so designated for the purchase of such shares *the holders of such shares shall be entitled,* in respect to each share so called for purchase, *to the call purchase price thereof* * * * and thereafter shall have no other or further interest in the Trust Estate in respect to each share so called for purchase, and on presentation and surrender of such Certificate in accordance with such notice at the principal office of the Trustee, the holders of such Certificate evidencing the shares so called for purchase shall be entitled to receive, in respect to each share so called for purchase, such call purchase price and no more. * * *." (Italics added) (Reprinted in full, R., 103, 104)

(3) **Duties of the Trustee and Rights of the Beneficiaries Upon the Termination of the Trust by Lapse of Time.**

(i) "*Article IV*. Section 7. In case upon the expiration of the original term of ninety-nine years of the lease the Trustee as Lessor shall, pursuant to the provisions of Section 6 of Article Three of the Lease, become the owner of the cash and/or securities, including any of said Land Trust Certificates, then in the Depreciation Fund, *the Trustee shall distribute pro rata to the owner or owners of the certificates issued hereunder and then outstanding* * * * *all cash and/or securities*, including any of said Land Trust Certificates, then in the Depreciation Fund." (Italics added) (Reprinted in full, R., 105).

(ii) "*Article XIV*. * * * Unless sooner terminated this trust shall terminate upon the expiration of the Lease hereinbefore mentioned, or if said Lease shall be renewed, then upon the expiration of the term of said renewal. In any case of the termination of this trust otherwise than upon the exercise by the Lessee of its option to purchase the Trust Estate, distribution shall be made by the Trustee in kind by conveyance of the Trust Estate in undivided legal interests, or *at the election of the Trustee*, by sale and distribution of proceeds as in this Declaration provided. * * *." (Italics added) (Reprinted in full, R., 115, 116).

(4) **Powers of the Trustee of the Clark-Randolph Building Site.**

The nature of the appellant's interest in the Clark-Randolph Building Site trust is further disclosed by an examination of the provisions of the trust agreement and

declaration relating to the powers of the trusts over the trust estate:

(i) "*Article IX.* • • • The Trustee shall have the exclusive right to control the Trust Estate as it may deem for the best interests of the Beneficiaries, free from all control by the Beneficiaries, as fully and to the same extent as though the Trustee were the sole legal and equitable owner thereof, and shall not be subject to any obligations to the Beneficiaries other than such as are expressly assumed hereunder." (Reprinted in full, R., 109-112.)

(ii) "*Article XIV.* This Declaration may be amended from time to time or the trust terminated by written instrument executed and acknowledged by the Trustee and consented to in writing by the owner or owners of three-fourths (¾) of the outstanding shares issued hereunder, • • •; provided, however, that no such amendment shall increase the liabilities of the Lessee under the Lease without its consent and provided further that *no such amendment shall deprive or take from the Trustee the control and/or discretion conferred upon it under this Declaration, or confer upon the owner or owners of outstanding shares issued hereunder, or any of them, any control over or voice in the administration of this Trust.*" (Italics added) (Reprinted in full, R., 115).

(iii) "*Article IV.* Section 4. The Trustee is fully authorized to complete any sale referred to in Sections 1, 2 and/or 3, (Article IV), full power and authority being hereby vested in it in connection with such sale to execute all conveyances, releases, cancellations, assignments and/or other transfers of the property sold as may be necessary or proper to convey title thereto, without securing any consent from the Beneficiaries, and any conveyance by the Trustee shall operate to divest all interest of the Beneficiaries in the property so conveyed, the in-

terest of the Beneficiaries being transferred to the proceeds of sale as provided by the terms of this Declaration." (R., 102.)

(b) **Analysis of the East Sixth Street, Cleveland, Ohio, Trust. (Exhibit 19, R., 117.)**

Although the provisions of the East Sixth Street Trust are substantially the same as those of the Clark-Randolph Building Site Trust, since it has been agreed between counsel for the respective parties (R., 183-184) that the decision of this Court with respect the certificates of equitable ownership issued under that agreement and declaration of trust shall be applied to the other certificates of equitable ownership relating to Ohio real estate involved in this case, it is necessary to make a detailed analysis thereof. As in the case of the appellant's certificate in the Clark-Randolph Building Site Trust, the certificate held by him which evidences his interest in the East Sixth Street Trust does not fully disclose the nature of his interest. Instead, reference is made to the agreement and declaration of trust under which it was issued:

"* * * All of said Certificates are issued or are to be issued under and in pursuance of an Agreement and Declaration of Trust * * * to which Declaration reference is hereby made for a statement of the rights of the holder of this Certificate and all other Certificates issued under the Declaration, in said property and of the terms and conditions of said trust." (R., 75-76.)

An examination of Exhibit 19 (R., 117) shows that the rights of the plaintiff under the East Sixth Street Agreement and Declaration of Trust are, as follows:

(1) **Duties of the Trustee and Rights of the Beneficiaries During the Continuance of the Trust Agreement.**

(i) "*Article I.* The Trustee hereby declares that it holds and will hold as Trustee for the use and benefit of all present and future holders of the Certificates of Equitable Ownership issued hereunder * * * the title to the premises acquired by the Trustee by deed from The Fidelity Mortgage Company * * *." (R., 117-118.)

(ii) "*Article III.* The Trustee agrees that * * * it will distribute among the beneficiaries in proportion to their respective interests as evidenced by Certificates issued hereunder and at the time outstanding, all the net proceeds which may be received by it under the terms of the Lease up to a total of Twenty-seven and 50/100 Dollars ($27.50) per half-year * * *." (R., 122.)

(2) **Duties of the Trustee and Rights of the Beneficiaries Upon the Termination of the Trust by Act of the Parties.**

(i) "*Article V.* Each one/one-thousand-and-fiftieth (1/1050th) fractional share represented by Certificates issued hereunder is subject to purchase by call, upon the request of the Lessee, as provided in Article IV hereof, on and after July 1, 1940, at One Thousand Twenty-five Dollars ($1025.00) per share * * *." (R., 125-126.)

"*Article IV.* * * * the holders of such Certificates shall be entitled, in respect to each one/one-

thousand-and-fiftieth (1/1050th) interest so called for purchase, only to the amount in the hands of the Trustee for such purchase of such Certificate, and shall have no other or further interest in the Trust Estate in respect to each one/one-thousand-and-fiftieth (1/1050th) interest so called for purchase * * * and * * * shall be entitled to receive * * * such call purchase price and no more." (R., 125.)

(ii) "*Article VII.* Upon the exercise by the Lessee of the option to purchase the leased premises (granted in Article VI), or upon sale by the Trustee of the entire property comprised in the Trust Estate, pursuant to and because of default of the Lessee in any of the provisions of the Lease as provided in Article X hereof, the Trustee upon receipt of the option price or the sale price, as the case may may be, * * * shall distribute the net proceeds among the Beneficiaries holding outstanding Certificates, in accordance with the respective interests held by them, as evidenced by their several Certificates and upon their surrender thereof. Notice of any such distribution shall be given * * *. If after notice has been given * * *, the holder or holders of any outstanding Certificates shall fail or neglect to present the same at the time and place in said notice specified, the Trustee shall place to the credit of each outstanding Certificate the distributive share to which its holder is entitled, and shall be subject to no further liability and under no further duty to the Beneficiary holding the same under the trusts created by this instrument, except to pay to said holder such distributive share upon demand and the surrender of said Certificate, nor shall it be required to pay interest upon any fund so credited." (R., 127-128.)

(3) Duties of the Trustee and Rights of the Beneficiaries Upon the Termination of the Trust by Lapse of Time.

The East Sixth Street Trust agreement contains no provision for termination of the trust by lapse of time. The only reference to the duration of the trust is found in Article X, as follows:

> "Unless terminated by sale of the Trust Estate this trust shall continue during the existence of the Lease and any renewals thereof, or any lease or leases made by the Trustee, under the terms hereof." (R., 132.)

In the East Sixth Street agreement and declaration of trust there is no provision whatever for distribution of the trust estate in kind, even at election of the trustee. If the lessee for the time being is in default, Article X directs the trustee to proceed, as follows:

> "In the event that the Lessee shall make default in any of the provisions of the Lease so that it shall have become necessary, or, in the opinion of the Trustee advisable, for the Trustee, as Lessor, to terminate the same, the Trustee shall give not less than fourteen (14) days' notice thereof to the Beneficiaries * * * and shall request therein advice as to whether the property should be offered for sale, or whether another lease thereof should be made, if possible. If the holders of not less than a majority in interest of the outstanding Certificates shall * * * notify the trustee, in writing, of their agreement upon the course to be taken, the Trustee shall endeavor in its discretion to comply with their wishes. In the event of the failure or neglect of the holders of not less than a majority in interest of the outstanding certificates to express their wishes within

the period above provided, or, in the event the Trustee shall find, after making reasonable efforts, that it is impracticable to comply with such expressed wish of said Certificate Holders, it shall have full authority to take such action with respect to selling, leasing for ninety-nine (99) years renewable forever, or for lesser terms, managing, operating or otherwise disposing of said property as it may deem advisable and for the best interest of said Certificate holders." (R., 130-131.).

(4) Powers of the Trustee of the East Sixth Street Trust.

The nature of the appellant's interest in the East Sixth Street Trust estate is further disclosed by referring to the provisions of the agreement and declaration of trust granting power over the trust estate to the Trustee:

(i) "*Article XIV.* • • • The Trustee shall have the exclusive right to manage and control the Trust Estate as it may deem for the best interests of the Beneficiaries, free from all control by the Beneficiaries, as fully and to the same extent as though the Trustee were the sole legal and equitable owner thereof, and shall not be subject to any obligations to the beneficiaries other than such as are expressly assumed hereunder.

"The Trustee shall likewise have full and unrestricted power and authority to enter into, execute and deliver any agreements and instruments in writing modifying, amending or supplementing the Lease, if and when, in the sole and absolute discretion of the Trustee or Lessor, it shall appear wise, expedient or proper so to do." (R., 135.)

(ii) "*Article VI.* • • • In the event that the Lessee exercises said option to purchase, the Trustee is fully authorized to complete such sale, full

power and authority being hereby vested in it to execute all conveyances, assignments and/or other transfers of the property sold as may be necessary or proper to convey title thereto, without securing any consent from the Beneficiaries." (R., 127.)

(c) Conclusions with Respect to the Clark-Randolph Building Site and East Sixth Street Trusts.

The necessity of laying emphasis upon the terms of the agreements and declarations of trust introduced in evidence by the appellant lies in the fact that it is only by reference thereto that the *nature* of his property in the several trusts can be ascertained and its taxability under the laws of Ohio can be determined. The record shows that on January 1, 1932, tax listing day in Ohio, all of the trust agreements under which the appellant claims were in full force and effect; that during the year preceding that date the trustees had performed their ordinary duties, namely, the collection of rents under the several leases and their distribution to the beneficiaries; and that the appellant had enjoyed his right to receive such distributions of income from the trustees (R., 43). In other words, *on January 1, 1932, tax listing day in Ohio, the interest of the appellant in the several trusts consisted of his rights to participate pro rata in the distribution of the net proceeds of rentals received by the trustees under the terms of the several leases referred to in the trust instruments, that is, claims against the various trustees in the nature of equitable choses in action entitling appellant to receive sums of money represent-*

ing his pro rata share of distribution of income made at stated intervals in accordance therewith. It is respectfully submitted that this interpretation of the agreements and declarations of trust is required by Article VI of the Clark-Randolph Building Site Trust agreement and declaration of trust (R., 106) and Article XI of the East Sixth Street agreement and declaration of trust (R., 132), paragraph 1 of Article VI of the Clark-Randolph agreement and declaration of trust reading in part as follows:

> "No Beneficiary as such shall have any legal title to the trust property itself, or any part thereof, real or personal, held by the Trustee, his interest being an equitable estate only, and he shall have no right to call for any partition of the Trust Estate during the continuance of the trust, any and all such rights being waived by the Beneficiaries, by acceptance of the Land Trust Certificates. * * *" (R., 106.) (R., 132, is in almost identical language.)

The proposition that the state of Ohio has the power to tax intangible personal property, including equitable choses in action, belonging to its citizens and residents, whether the domicile of the obligor or obligors thereof be within or without the state has not been contradicted. The only question, therefore, which this Court is called upon to decide at this stage of the case is whether or not the interest of the appellant in the several trusts is by nature such as to bring it within that rule. The appellees respectfully submit that the interest of the appellant is a species of intangible personal property consisting of a bundle of equitable choses in action because the provi-

tions of the agreements and declarations of trust of record herein have indelibly and unequivocally stamped that character upon it by giving it all the qualities thereof for purposes of the management and control of the trusts. At the time the trusts were created, the interests of all the beneficiaries consisted merely of a congeries of rights, etc., and such was the interest acquired by appellant when he became a party thereto. Having made the property personalty for such purposes the appellees justifiably urge that it should be so considered when the appellant is called upon to support the government of the state under whose protection he enjoys the benefits which the ownership of the property brings to him. See *Lawrence v. State Tax Commission of Mississippi*, 286 U. S., 276, 280-281 (1932); *Dana v. Treasurer and Receiver General*, 227 Massachusetts, 562 (1917); *Priestley v. Treasurer and Receiver General*, 230 Massachusetts, 452 (1918); *In re Stephenson's Estate*, 171 Wisconsin, 452 (1920).

(d) **Analysis of the Lincoln Inn Court Trust.**

The Lincoln Inn Court Trust has been reserved for separate treatment because of superficial differences in the manner in which the declaration of trust in that case has been drawn up. Thus, instead of describing the evidence of the interest of the beneficiaries therein as land trust certificates, it has been called a certificate of interest in ground rent. An examination of the terms of the declaration of trust (R., 82), however, discloses that sub-

stantially there is no difference between the interest of the appellant in the Lincoln Court Trust and his interest in the other trust estates referred to in his petition (R., 43).

The relevant portions of the declaration of trust in the Lincoln Court Trust are, as follows:

"KNOW ALL MEN BY THESE PRESENTS, on the 5th day of February, 1917, The Conrad-Windisch Company did sell and convey to The Title Guarantee & Trust Company the following described real property, * * *

"Now Therefore, said The Title Guarantee & Trust Company of Cincinnati, Ohio, hereby acknowledges, certifies and declares that it holds and will continue to hold the title to said premises for the use and benefit of the holders of certificates of interest in the ground rent hereinafter referred to and upon the following trusts, to wit:

"(1) To lease said premises to Charles F. Dickson for ninety-nine years renewable forever at an annual rental of $5,518.75 per annum, payable quarterly * * * with the privilege of purchase after ten years * * * for the sum of $127,500 * * *

"(4) To collect and receipt for the rental due upon said perpetual lease * * * and after deducting * * * the * * * Trustee's compensation, to distribute the balance to the holders of such certificate in proportion to the interest of each.

"(5) Upon the demand of one or more holders of such certificates aggregating $10,000 par value, and the surrender of such certificates to convey to such holders jointly by special warranty deed the proportionate part of the fee simple title to said property to which their certificates may entitle them. * * *

"(8) This trust shall continue until the exercise of the privilege of purchase reserved in said lease at

> which time all certificates must be surrendered to the Trustee, or until the entire property shall have been conveyed pursuant to the provisions of article (5) of this agreement. • • • When the privilege of purchase reserved in said lease shall be exercised, the Trustee shall forthwith convey said premises to the lessee or his assigns, and the rights of the certificate holders in said premises shall thereupon cease and determine and be transferred to the proceeds of sale in the hands of the Trustee." (R., 82-83, 86-87, 88.)

These excerpts from the Lincoln Inn Court declaration of trust show that the interest of the appellant therein was substantially identical with his interest in the other trusts, namely, to receive the payment of a sum of money at stated intervals, and to receive his *pro rata* share of the proceeds of a sale of the property to the lessee upon the latter's exercise of his option to purchase; and that it is taxable in the same manner and to the same extent as is his interest in the other trusts involved in this case. While it is true that upon demand and surrender of his certificates of equitable ownership the appellant would have been entitled to a conveyance of a proportionate part of the fee simple title to the property held by the trustee, there is no evidence whatever in the record to show that either of these conditions precedent had been fulfilled prior to January 1, 1932, tax listing day in Ohio. There is, therefore, no need to advert to what his tax liability might have been had he exercised the powers he possessed to acquire an interest different from that which he actually had on that day. As Mr. Justice Mc-

Reynolds of this Court said in *Union Tank Line Company v. Wright*, 249 U. S., 275, 286 (1919), "Taxes must follow realities, not mere deductions from inadequate or irrelevant data."

VI.

ANALYSIS OF THE ARGUMENT OF THE APPELLANT THAT THE INTEREST OF A HOLDER OF A LAND TRUST CERTIFICATE IS AN INTEREST IN REAL PROPERTY.

In their brief counsel for the appellant make the assertion that "the interest of a holder of a land trust certificate is an interest in real property" (brief, 14), and they cite a number of cases and other authorities to support it, without, however, making any analysis of the cases cited or any attempt to demonstrate their applicability to the facts of the case now before this Court.

In general the cases and authorities cited by appellant may be classified as follows:

(1) cases decided by the courts of Ohio, together with an opinion of the attorney general of the state, rendered in 1926;

(2) cases decided by the courts of other states;

(3) cases decided by the courts of the United States;

(4) texts, treatises, and law review articles dealing with the subjects of equity and trusts; and

(5) the restatement of the law of trusts of the American Law Institute.

(1) Many, if not all, of the cases decided by Ohio

courts cited by counsel for the appellant were called to the attention of the Supreme Court of Ohio when this case was before it, but that Court apparently did not regard them as establishing a rule of decision applicable to the facts of the case, since it did not refer to any of them in its opinion. But, assuming for purposes of argument that they were in point, the Supreme Court of Ohio was at liberty to disregard them in reaching its conclusion in this case if it saw fit to do so. The decisions of this Court show that the Supreme Court of Ohio might even render an erroneous decision on a question of state law, or might overrule principles or doctrines established by previous decisions on which the appellant relied, without giving rise to a claim under the Fourteenth Amendment or otherwise conferring upon this Court the power of review. *Central Land Company v. Laidley*, 159 U. S., 103, 112 (1895); *Patterson v. Colorado*, 205 U. S., 454, 461 (1907); *Willoughby v. Chicago*, 235 U. S., 45, 50 (1914); *O'Neil v. Northern Colorado Irrigation Company*, 242 U. S., 20, 26-7 (1916); *Dunbar v. City of New York*, 251 U. S., 516, 519 (1920); *Rooker v. Fidelity Trust Company*, 261 U. S., 114, 118 (1923); *Tidal Oil Company v. Flanagan*, 263 U. S., 444, 450 (1924); *American Railway Express Company v. Kentucky*, 273 U. S., 269, 273 (1927); *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U. S., 673, 680 (1930). Under the decisions of this Court, cited supra, the decision of the Supreme Court of Ohio in this case must be regarded as the current expression of its views as to the nature of the property of the appellant which the appellees seek to tax.

A fortiori, the opinion of the attorney general of Ohio, relied upon by the appellant in his brief (p. 15), may be disregarded. Further, it may be said, that at the time this opinion was given, the Constitution of Ohio required that all property be taxed by uniform rule according to value. Since then, however, Article XII, Section 2, of the Constitution of Ohio (Reprinted in full, this brief, p. 71) has been amended so as to permit the General Assembly to classify personal property for purposes of taxation, and the provisions of the General Code now under consideration were enacted pursuant to that amendment. Furthermore said changes in the tax laws of Ohio necessarily call for a re-examination of the question of the nature of the beneficiaries' interest in trust estates of the kind involved in this case.

(2) Council for the appellant also cite a number of cases decided by courts of states other than Ohio. Again, it may be said, that many if not all of these cases were relied upon by the appellant in the Supreme Court of Ohio. Assuming for the purposes of argument that they were in point, their authority was persuasive merely, and their usefulness as an aid in reaching a conclusion in this case was at an end when the Supreme Court of Ohio rejected them.

(3) Counsel for the appellant also rely upon the case of *Brown v. Fletcher*, 235 U. S., 589 (1915), for the purpose of showing that "an equitable interest is not a chose in action, but an interest in property." (Appellant's brief, p. 21.) The facts of that case were these:

A, by will, directed that a sum of money be held in trust and invested for his son, B, who was to receive the income until he attained the age of fifty-five, when the "principal should be paid to him and belong to him absolutely." Subsequently, B assigned his interest under the trust to C, who thereafter transferred that interest to secure a note representing a loan made to him by D. When the note fell due, it was not paid and D, thereupon, demanded that the trustee pay over to him that to which he was entitled by virtue of the trust instrument, B having attained the age of fifty-five. The trustee refused and D then brought a suit in the United States District Court for the Southern District of New York. That Court, however, dismissed the bill on the ground that, as the assignor B, a citizen of New York, could not have sued the trustee, a citizen of the same state, neither could the complainant, D, his assignee, sue therein, even though he was a resident of the state of Pennsylvania, because Section 24 of the Judicial Code forbade district courts from taking cognizance of any suit to recover upon choses in action in favor of any assignee unless such suit might have been prosecuted in such court to recover upon said chose in action if no assignment had been made.

Upon appeal to this Court, the decree was reversed on the ground that B had an interest in and to the property that was more than a chose in action.

Reciting the fact that at the time the suit was brought B had reached the age of fifty-five when, according to the terms of the will directing the creation of the trust,

"the principal should be paid to him and belong to him absolutely," this Court said at page 599:

> "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. * * *"

A comparison of the position of the complainant in the case of *Brown v. Fletcher* with that of the appellant in this case shows that whereas in the former case the complainant was entitled to an absolute transfer of the corpus of the trust to him at the time the suit was brought, in the instant case not only was the appellant not entitled to such a transfer on January 1, 1932, but, as the evidence shows, he would never be entitled to such a transfer even upon the termination of the trusts. Obviously, the nature of the interest of the beneficiary in an admittedly dry trust cannot be used as the basis for characterizing the nature of the interest of a beneficiary in an active or living trust. In the latter case, the nature of the beneficiary's interest at a given time can be determined only by resort to the trust instrument under which such interest is held; and when this is done in this case, it will be found, as heretofore indicated, that the rights of the beneficiary consist merely of claims against the various trustees to the *pro rata* distribution of income, during

the continuance of the trusts, and to the *pro rata* distribution of the proceeds of a sale of the trust estates upon their termination. Counsel for the appellant admit that this is the case in their brief (p. 10), where they say:

> "The land trust certificate holder is entitled to his proportionate share of the net rent, when, as and if collected by the trustee (R., 98), and his proportionate share of the purchase price, in case privilege of purchase is exercised (R., 100), or his proportionate share of the property held in trust in case there is default and *the trustee decides to distribute*, instead of making a sale (R., 115, 116)." (Italics added.)

It is, therefore, respectfully submitted that the reliance of the appellant upon *Brown v. Fletcher* is misplaced, and that it is not a precedent for the determination of the issues in this case.

(4) The quotations from various texts, treatises, and law review articles set forth by counsel for the appellant in their brief are apparently chosen at random and without reference to the facts of the case now before this court. Such statements *in vacuo* are of little, if any, assistance to the court in reaching a conclusion in a particular case. It is not denied that there is a controversy among writers on the law of trusts as to the nature of a beneficiary's interest. The most exhaustive discussion of the subject is found in an article by Professor Austin W. Scott, called "The Nature of the Rights of the Cestui Que Trust," in 17 Columbia Law Review, 269, and in an article by former Dean (now Mr. Justice) Stone, under the same title and in the same volume of the Columbia

Law Review at page 467. After considering the views of Professor Scott, Dean Stone, at page 500, said:

> "To summarize the matter, it is believed that the view of the nature of the right of the *cestui que trust* most consistent with the decisions and which gives greatest promise of the development of the law upon a moral basis is that the right of the *cestui* is a right *in personam* against the trustee, specifically enforceable with reference to the trust *res*; that the *cestui* acquires rights *in personam* against the third persons, not because he is equitable owner of the trust *res*, but through equity's imposing upon third persons, obligations *in personam*, because of their unconscientious interference with the right which the *cestui* has against the trustee; that, therefore, equity imposes on all the world the duty of not consciously aiding in a breach of trust or preventing the *cestui* from having the benefit of the obligation of the trustee. The great advance which equity made over the common law system was in the emphasis which it placed on the duty or obligation of the defendant, whereas law placed its emphasis on the right of the plaintiff. With this difference in fundamental conceptions, it was inevitable that law should to some extent become rigid and technical, and that equity, on the other hand, should approximate more closely the standards of an enlightened morality. If, therefore, the law should adopt the view that the right of the *cestui que trust* rests on the basis of the property right of the plaintiff in the trust *res*, rather than upon the duty of the community at large not to interfere consciously with the right of the *cestui* to have the performance of the trustee's duty, it would not only depart from the historical attitude of equity, but it would commit itself to a doctrine which as Maitland said 'is positively mischievous'. * * *."

The views thus expressed apply to the nature of the rights of the *cestui que trust* without regard to the terms of any specific declaration of trust. They are especially pertinent to the issues of this case where, at the time the agreements and declarations of trust were entered into, the parties thereto expressly provided that the beneficiaries should have no rights with reference to the trust estates other than to share in the distribution of income during the continuance of the trusts, and in the proceeds realized from the sale of the corpus upon their termination. Moreover, it should be noted that no question of aggression upon or infringement of the interest of the *cestui que trust* by third parties is raised in this case; nor is the matter of descent involved herein. The issue is solely as to the nature of the interest of the beneficiary for purposes of taxation.

(5) The restatement of the law of trusts of the American Law Institute is the work of Professor Scott and his associate reporters. As his article in the Columbia Law Review, supra, indicates, he is committed to the *in rem* theory of the nature of the interest of the beneficiary. Other authorities upon the law of trusts do not take this view. Thus, Professor Richard Powell, of the School of Law, Columbia University, testifying as an expert in the case of *Archer-Shee v. Garland*, (1931), A. C., 212, 218, stated the American view of the nature of the beneficiary's interest under a trust, in these terms:

> "Every express trust valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustee in law, and in equity, subject only to the execution of the trust period. *The*

> *persons for whose benefit the trust is created shall take no estate or interest in the lands, but may enforce the performance of the trust in Equity.*" (Italics added.)

This is said to be "more closely in consonance with the traditional view of a court of equity." *Keeton*, Law of Trusts, (1934), p. 289.

VII.

THE INTEREST OF THE APPELLANT IN THE SEVERAL TRUSTS UNDER CONSIDERATION IN THIS CASE IS NOT AN INTEREST IN LAND.

When a man says that A owns land or an interest in land, precisely what does he mean? Suppose for example, that A is the fee simple owner of Blackacre. In a popular sense he owns "land" or "an interest in land;" but, when examined, his interest or property relating to the tangible object that is called land will be seen to consist of legal relations between himself and other persons. In the leading case of *Eaton v. B. C. & M. R. R. Co.*, 51 N. H., 504, 511 (1872), Mr. Justice Jeremiah Smith said:

> "In a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land * * * in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.'"

Thus, without attempting to exhaust the subject, A in relation to Blackacre may enter on the land and use it within limits fixed by law on grounds of social and economic policy as he pleases; he can keep others from entering on and using the land; and he can alienate his interest to another. Moreover, apart from the exercise of the power of eminent domain, no person may prevent his going on the land, or his using it within the limits referred to; nor can such person deprive him of these incidents of ownership without his consent. In short, A, as an owner of land has the privilege of using it, the right that no one else shall use it, the power to dispose of it, and the immunity from having it taken away from him. *Hohfeld*, Fundamental Legal Conceptions (1923), *passim*, but especially at page 96.

In the light of the foregoing analysis, the contention of the plaintiff that his interest in the several trust estates is land or an interest in land may be examined. Taking the Clark-Randolph Building Site Trust as typical, it appears that on January 1, 1932, a lessee was in actual occupancy of the premises under a ninety-nine year term, renewable for a like period. The lessor-trustee held the reversion, but even this was subject to an option to purchase. Could the plaintiff have used the land or building as he pleased on that date, or could he have kept others from using it? Could he have done any act which in any way might have changed the legal relations between the lessor and the lessee, or between them or either of them and any other person or persons on that day?

The answer to these questions is, obviously, no. The plaintiff could not have done any of these things because under the facts of this case he had no one of the incidents which in the aggregate constitute the bare bones of ownership or land or an interest in land. As heretofore demonstrated, his rights were exclusively personal, i. e., rights against the various trustees that they should distribute the income of the trust estates *pro rata* to the beneficiaries, including the plaintiff, during the continuance of the trusts; and upon their termination that they should distribute the proceeds realized from the sale or other disposition of the corpus. In a realistic sense, the property of the plaintiff in the trust estates was merely a species of intangible personal property, a bundle of equitable choses in action, and not land or an interest in land. His contention, therefore, being based upon an assumption which upon analysis turns out to be erroneous, should be denied.

On the basis of the foregoing analysis, it is respectfully submitted that the action of the appellees in this case in seeking to tax the intangible personal property of the appellant is sanctioned by the case of *Maguire v. Trefry*, 253 U. S., 12 (1920). Although the tax in that case was nominally an income tax, the reason why the state of Massachusetts had jurisdiction to tax was because the property from which the income was derived belonged to a resident beneficiary, and the case was, therefore, governed by the principle laid down in *Kirtland v. Hotchkiss*, 100 U. S., 491 (1879). In the instant

case, the subject-matter of the tax is the claims or rights of the appellant against the trustees of the various trusts, and the parallel is exact for the appellant is domiciled in Ohio, has the protection of her laws, and here receives and holds the income distributed by the trustees.

Nothing said by this court in the case of *Safe Deposit & Trust Company v. Virginia*, 280 U. S., 83 (1929) militates against this conclusion. The question of the power of Virginia, the domicile of the beneficiaries of the trust there under consideration, to lay a tax on the fair value of any interest in the trust estate actually owned by them, was not presented for consideration (p. 92). But if the question had been presented, as it is in this case, it is respectfully submitted that its answer may be found in the remarks of Mr. Justice Stone, in his concurring opinion. He said (p. 96):

> "If the question were here I should not be prepared to go so far as to say that the equitable rights *in personam* of the beneficiaries of the trust might not have been taxed at the place of their domicile quite as much as a debt secured by a mortgage on land in another jurisdiction, notwithstanding the fact that the land is also taxed at its situs. See *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S., 194, 205; *Bristol v. Washington County*, 177 U. S., 133; *Kirtland v. Hotchkiss*, 100 U. S., 491; *Savings Society v. Multnomah County*, 169 U. S., 421, 431. In neither case, if the threat of double taxation were controlling, which under the decisions it is not, *Fidelity & Columbia Tr. Co. v. Louisville*, 245 U. S., 54, 58; *Cream of Wheat Co. v. Grand Forks Co.*, 253 U. S., 325, 330; *Citizens Nat'l Bank v. Durr*, 257 U. S., 99, 109; cf. *Swiss Oil Corporation v. Shanks*, 273

U. S., 407, 413, would it seem that in any real sense is there double taxation, since the legal interests protected and taxed by the two taxing jurisdictions are different."

VIII.

THE INTANGIBLE TAX LAW OF OHIO IMPOSES A TAX UPON THE EQUITABLE INTEREST OF THE APPELLANT IN THE SEVERAL TRUSTS UNDER CONSIDERATION HEREIN.

In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically included within their terms. In cases of doubt a taxing statute is construed most strongly against the government, and in favor of the citizen. *Gould v. Gould*, 245 U. S., 151, (1917). Notwithstanding this rule of interpretation, there is no doubt whatever in the case now before this Court that the provisions of the intangible tax law of Ohio do impose a tax on the equitable interest of the appellant in the several trusts involved herein. The sections of the General Code, as amended and enacted in the intangible tax law, imposing a tax upon the equitable interest of the appellant in these trusts and providing for their assessment, are here noted.

Section 5328-1 of the General Code provides generally

for the taxation of intangible personal property, as follows:

> "All moneys, credits, *investments*, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; * * *" (Italics added).

Section 5323 of the General Code defines the term "investments" for purposes of taxation, as follows:

> "The term 'investments' as used in this title, includes the following:
>
> "Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing * * *.
>
> "Interest bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures and notes; * * *.
>
> "Annuities, royalties and *other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced,* * * *.*
>
> "*All equitable interests*, life or other limited estates and annuity interests *in any investment hereinbefore described*, or in any fund made up of any such investments, wherever located" (Italics added).

Section 5370 of the General Code designates the persons who are required to return property for purposes of taxation. This section provides:

> "Each person shall return all the taxable property of which he is the owner excepting that required by this section or by the regulations of the commission to be returned for him by a fiduciary; *but noth-*

ing herein shall be so construed as to authorize any person to omit from his return of taxable property investments owned or held for his benefit by a fiduciary, or other taxable property so owned or held by a non resident fiduciary. * * *

"All the taxable property, *excepting investments*, of a person for whose benefit property is held in trust shall be returned by the trustee; and if any beneficiary of such a trust be a minor, an idiot or an insane person, residing in this state, and for whom there is no other fiduciary in this state, the commission may require such a trustee to return also the investments of any such beneficiary." (Italics added).

Section 5388 of the General Code lays down certain rules for the listing and assessment of personal property, tangible and intangible. This section provides, among other things, as follows:

"In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof in money, on the day as of which such investments are required to be listed."

Section 5389 of the General Code defines the term "income yield" in connection with the taxation of intangible property:

"'Income yield' as used in section 5388 of the General Code and elsewhere in this title means the

aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:

"* * * In the case of equitable interests, the cash distributions of income so made. * * *"

Section 5638 of the General Code, so far as it is material to the question here presented, provides as follows:

"For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar; * * *."

A reading of these sections of the General Code makes it plainly evident that it was the intention of the General Assembly to impose a tax upon contractual obligations for periodical payment of money and contractual or other incorporeal rights of a pecuniary nature from which income is or may be derived, however evidenced, including equitable interests, as investments, and that the tax which the appellees herein seek to collect from the appellant has been imposed. It will also be noted that under the provisions of Section 5370 of the General Code investments held in trust are not returned for taxation by the trustee, but by the owner of the equitable or beneficial interest in such trust estates. This provision of

the law is radically different from the pre-existing law governing the return of equitable interests in trust estates under which the trustee was required to list such property. The purpose and policy underlying the provisions of Section 5370 of the General Code, requiring the beneficiary of the trust to make the return for taxation, is to reach for purposes of taxation the interests of Ohio beneficiaries in trust estates, the corpus of which is held outside of the state. Obviously, the state of Ohio does not have any jurisdiction over a non-resident trustee and cannot tax such trustee or the corpus of the trust in his hands. By imposing the tax on the equitable interest in the trust estates only without respect to whether the trustee of said estates is in or out of this state, and by measuring the value of such equitable interest of the resident beneficiary in the trust estate according to the income yield to such beneficiary, the General Assembly has undertaken to reach a large amount of wealth which has heretofore been escaping taxation in this state. And it may here be observed that if the appellant prevails in his contentions in this case, persons residing in this state may now, as under the former law, invest their wealth in trust estates created in other states and thereby escape taxation in this state while enjoying the benefits thereof under the protection which the government of the state of Ohio affords.

The other sections above noted do not require extended comment. Sections 5388 and 5389 of the General Code indicate, among other things, how investments shall be assessed for purposes of taxation; and Section 5638 of the General Code provides for the rate of taxation on this class of property.

IX.

SECTION 5323 OF THE GENERAL CODE DOES NOT ESTABLISH AN ARBITRARY CLASSIFICATION, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR ANY OTHER PROVISION OF THE STATE OR FEDERAL CONSTITUTIONS.

There is no constitutional requirement, either in the Constitution of the state of Ohio, or in the Constitution of the United States, that its system of taxation shall be uniform as applied to individuals and corporations regardless of the circumstances in which it operates. The equal protection clause of the federal Constitution does not require a state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to observe a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discrimination not shown to be arbitrary or capricious, do not fall within constitutional prohibitions. *Ohio Oil Company v. Conway*, 281 U. S., 146, 159 (1930); *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S., 232, 237 (1890); *Magoun v. Illinois Trust & Savings Bank*, 170 U. S., 283, 293 (1898); *Southwestern Oil Company v. Texas*, 217 U. S., 114, 121 (1910); *Brown-For-*

man Company v. Kentucky, 217 U. S., 563, 573 (1910); *Sunday Lake Iron Company v. Wakefield*, 247 U. S., 350, 353 (1918); *Heisler v. Thomas Colliery Company*, 260 U. S., 245, 255 (1922); *Oliver Iron Mining Company v. Lord*, 262 U. S., 172, 179 (1923); *Stebbins v. Riley*, 268 U. S., 137, 142 (1925); *State Board of Tax Commissioners v. Jackson*, 283 U. S., 527, 537 (1931); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S., 276, 284 285 (1932).

The appellant contends that Ohio cannot, consistently with the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, tax some interests in real estate on a different basis than it taxes others where there is no reason for the classification, (Brief, p. 34); and that it is unconstitutional discrimination to tax equitable interests in land divided into shares evidenced by transferable certificates and to exempt from taxation (a) the same equitable interests when not represented by such certificates; and (b) legal interests in land, whether divided into shares or not, and whether represented by transferable certificates or not. (Brief, p. 35).

The whole case of the appellees rests upon a single proposition, namely, that the interest of the appellant in the several trusts is a species of intangible personal property comprised in a bundle of equitable choses in action, within the definition of the term "investments," contained in Section 5323 of the General Code of Ohio, and, as such, taxable without regard to constitutional

limitations upon the power to tax land. If this court should hold upon the evidence presented in the record that the interest of the appellant in the several trusts is land, then the case is at an end and no consideration need be given to the circumstances in which Section 5323 of the General Code operates under the equal protection clause since the existence of the power to tax within the restrictions of the Fourteenth Amendment or Article XII, Section 2, of the Constitution of Ohio, necessarily precedes a consideration of the manner of its exercise. If, however, this court should hold, as it is respectfully submitted it should on the facts set forth in the record, that the interest of the appellant in the several trusts is a species of intangible personal property, then the appellant can succeed under the equal protection clause only by showing that as applied to that interest, Section 5323 of the General Code is palpably arbitrary, that is, that no state of facts can be conceived reasonably to sustain it.

While underlying questions of fact may condition the constitutionality of legislation imposing taxes upon one class of persons or property and not imposing the same or similar taxes upon others, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. *Close v. Glenwood Cemetery*, 107 U. S., 466, 475 (1882); *Powell v. Pennsylvania*, 127 U. S., 678, 685 (1888); *Lindsley v. Natural Carbonic Gas Company*, 220 U. S., 61, 79, 83 (1911); *Chicago Dock Company v. Fraley*, 228 U. S., 680, 687 (1913); *Rast v. Van Deman & Lewis Company*, 240

U. S., 342, 357 (1916); *Wampler v. Lecompte*, 282 U. S., 172 (1930); cf., *Minnesota Rate Cases*, 230 U. S., 352, 461 (1913); Henry Wolf Biklo, 'Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action,' 38 Harvard Law Review 6. Therefore, unless the unconstitutionality of the statute appear on its face, or from facts which this Court must judicially notice, or from evidence appearing in the record showing affirmatively that the provision imposing the tax has no foundation to sustain it, the legislative act must prevail. *O'Gorman & Young v. Hartford Insurance Company*, 282 U. S., 251, 257 258 (1931); *Railway Express Agency v. Virginia*, 282 U. S., 440, 444 (1931); *Hardware Dealers Mutual Fire Insurance Company v. Glidden Co.*, 284 U. S., 151, 158 (1931); *Boston & Maine Railroad Company v. Armburg*, 285 U. S., 234, 240 (1932); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S., 276, 283 (1932).

The most searching examination of the record in this case will fail to reveal any factual data whatever tending to show that appellant has been taxed upon his investments in a manner which is discriminatory when compared with other persons similarly situated for there are neither allegations in his petition nor presentation of evidence in his proof to lay the foundation of fact upon which the contention that the provisions of Section 5323 of the General Code of Ohio deny to him the equal protection of the laws must rest. For aught that appears that section of the General Code, as applied to investments generally including those of the appellant has

achieved not only practical but theoretical uniformity and equality. It is, therefore, respectfully submitted that the contention of the appellant that Section 5323 of the General Code of Ohio deprives him of the equal protection of the laws should be denied.

X.

CONCLUSION.

It is a general rule of construction that when a statute is attacked on the ground that it is unconstitutional every presumption is indulged in in favor of its validity. Out of respect for a co-ordinate branch of the government courts will not declare a statute unconstitutional except in the clearest case, that is, in a case where no reasonable ground whatever can be found upon which the action of the Legislature in enacting the statute can be sustained.

The authorities cited herein clearly sustain the power of the state of Ohio to tax the intangible personal property of the appellant here in question. That property has been subjected to taxation by the provisions of Sections 5323, 5328-1, 5370, 5388, 5389, and 5638 of the General Code. Moreover, it appears that the tax imposed and the statutory provisions imposing it do not offend the equal protection of the laws clause of the Fourteenth Amendment to the Constitutions of the United States nor the somewhat similar clause contained in the bill of rights of the Constitution of Ohio.

It is, therefore, respectfully submitted, that the judgment of the Supreme Court of Ohio should be affirmed by this Court.

Respectfully submitted,

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APPENDIX.

Text of Statutes and Constitutional Provisions.

Statutes.

The statutes involved in this case are as follows:

Section 5323.

The term "investments" as used in this title, includes the following:

Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the federal government for the taxation of which by the several states no provision is made by act of the Congress of the United States, (2) those in financial institutions, dealers in intangibles and domestic insurance companies as defined by Chapter Four of this title, and (3) such as are defined in this chapter as "deposits."

Interest bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures and notes; certificates of deposit, savings and other like deposits in financial institutions outside of this state yielding income by way of interest or dividends in excess of four per centum of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or not, and whether or not secured by mortgage of or lien upon real or personal property or income, by

whomsoever issued, excepting such as have been issued (1) by the United States or any of its territories, districts, or dependencies, or (2) by any instrumentality of the federal government, or (3) prior to the first day of January, 1913, by the state of Ohio or any political or other subdivision or school district in this state and (4) bonds of the state of Ohio issued pursuant to Article VIII, Section 2a of the Constitution of Ohio and (5) such as are defined in this chapter as "deposits" and "current accounts."

Annuities, royalties and other contractual obligations for the periodical payment of money and all contractual and other incorpeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates and (3) employment and partnership contracts and salaries and wages derived therefrom.

All equitable interests, life or other limited estates and annuity interests in any investment hereinbefore described, or in any fund made up of any such investments, wherever located.

When any corporation provides and carries out a plan for the allotment and sale of any or all of its unissued shares, or of shares purchased or to be purchased, to the employees of the corporation or to the employees of subsidiary corporations or to a trustee on their behalf, and for the payment of such shares in installments or at one

time, and for the establishment of a special fund or funds in which such employees during the period of their employment or other period of time may be privileged to share on such terms and conditions as may be imposed in respect thereof; the relationship between the corporation or the trustee, if any, and each employee shall, for the purpose of determining the tax upon the shares concerned or upon any interest in them, be deemed to be a trust, and any tax upon the said shares or any interest in them shall be levied and assessed accordingly. (114 O. L., 715, 716.)

Section 5328-1.

All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; but the good will of a business shall not be considered to be property separate from the other property used in or growing out of such business. Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state, and capital and surplus of domestic insurance companies, shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons,

and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property as prescribed in this title.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock. (114 O. L., 717, 718)

Section 5370.

Each person shall return all the taxable property of which he is the owner excepting that required by this section or by the regulations of the commission to be returned for him by a fiduciary; but nothing herein shall be so construed as to authorize any person to omit from his return of taxable property investments owned or held for his benefit by a fiduciary, or other taxable property so owned or held by a non-resident fiduciary. The return of all the taxable property of a corporation shall be made by the president, a vice president, or the secretary and by the principal accounting officer thereof; that of a partnership, by a partner; and that of an association, by the managing agent thereof in this state.

In the following cases all taxable property belonging to the persons named or indicated shall be returned by the fiduciaries named:

That of a ward by his guardian; that of a minor, an idiot, or an insane person having no guardian, by his father, if living, if not, by his mother, if living, and if

neither father nor mother is living, by the person having such property in charge; that of an estate of a deceased person, by his executor, administrator or personal representative; and that of persons whose assets are in the hands of receivers, assignees for the benefit of creditors, trustees in bankruptcy or official custodians, by such receivers, assignees, trustees in bankruptcy or official custodians.

Personal property used in business and taxable property of a non-resident, used in and arising out of a business transacted for him or on his behalf in any of the cases mentioned in section 5328-2 of the General Code, in the possession or custody of any agent, factor, bailee or other similar fiduciary, shall be returned by such fiduciary, except that as to such property in the possession, custody or legal ownership of a trustee the provisions of the next succeeding paragraph of this section shall be exclusive.

All the taxable property, excepting investments, of a person for whose benefit property is held in trust shall be returned by the trustee; and if any beneficiary of such a trust be a minor, an idiot or an insane person, residing in this state, and for whom there is no other fiduciary in this state, the commission may require such a trustee to return also the investments of any such beneficiary.

All returns made as fiduciaries' returns shall be separate from the fiduciary's return as an individual, firm, association or corporation and shall set forth the names of all persons toward whom the relation of fiduciary is

borne or on whose behalf the returns are made, together with the capacity in which the fiduciary so acts for each of such persons.

The commission shall have power to adopt and promulgate regulations covering the making of returns not inconsistent with this section or any other provisions of this chapter, to the end that all property taxable in this state shall be returned for taxation. (114 O. L., 734)

Section 5388.

Excepting as herein otherwise provided, personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be. Deposits not taxed at the source shall be listed and assessed at the amount thereof in dollars on the day as of which they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day as of which they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money,

on the day as of which such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at the true value thereof, in money, on the day as of which the same are required to be listed.

Personal property of the following kinds, used in business, shall be listed and assessed at fifty per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be:

(1) All engines, machinery, tools and implements of a manufacturer mentioned in section 5386 of the General Code, and all engines and machinery of every description used, or designed to be used in mining, and all tools and implements of every kind used, or designed to be used for such purpose, excepting or provided in the last paragraph of this section, and all engines, machinery, tools, implements and domestic animals used in agriculture.

(2) The average value of all articles purchased, received or otherwise held by a manufacturer for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining; the average value of all articles which were at any time by him manufactured or changed in any way, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith; and agricultural products on farms.

Boilers, machinery, equipment and personal property used for the generation or distribution of electricity other than for the use of the person generating or distributing the same shall be listed and assessed at the true value thereof in money, on the day as of which they are required to be listed, anything in this section to the contrary notwithstanding. (114 O. L., 720.)

Section 5389.

As used in section 5388 of the General Code and elsewhere in this chapter, the "true value in money" of any property means the usual selling price thereof at the time or times and place as of which it is required to be listed; but if there is no usual selling price known to the person whose duty it is to fix a value thereon, then, such price as is believed could be obtained therefor in money, at such time or times and place. In the case of personal property used in business, the book value thereof, if any, less book depreciation, at such time or times, shall be listed and such depreciated book value shall be taken to be the true value of such property, unless the assessor shall find that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from depreciated book value must be made in writing by the taxpayer at the time of making return; and when such return is made to the county auditor and required by this chapter to be transmitted to the commission for assessment, the county auditor shall, as deputy of the commission, investigate such claim and shall enter thereon, or attach thereto, in such

form as the commission may prescribe, his findings and recommendations with respect thereto; when such return is made to the commission such claim for deduction shall be referred to the auditor of each county wherein the property affected thereby is listed, as such deputy, for investigation and report.

"Income yield" as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:

In the case of an obligation bearing interest, the amount of interest separately charged and paid during such year, if any, exclusive of payments on the principal; in the case of shares of stock, the cash dividends so paid; in the case of annuities or other obligations for periodical installment payments including both principal and interest, not separately charged and paid, four per centum of half of the principal used to purchase the same, or, if there be no such principal, four per centum of half of the present worth of such payments if commuted, which shall be calculated, as of the date on which such investment is required by this chapter to be first listed, with interest at four per centum per annum and, in the case of annuities for life or lives, according to the Combined Annuity Four Per Cent. Table; in the case of equitable interests, the cash distributions of income so

made. At the request of the commission or of any county auditor, the superintendent of insurance shall, upon being furnished with a statement of the facts, compute upon a basis equivalent to that herein prescribed, the income yield of any investment as to which the interest is not changed and paid separately from the principal thereof, and the assessor shall be governed by the computation so made. (114 O. L., 721, 722.)

Section 5638.

For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; capital and surplus of domestic insurance companies, five mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar. (114 O. L., 722.)

Constitutional Provisions.

Article I, Section 16, Constitution of Ohio:

All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Article XII, Section 2, Constitution of Ohio (in effect at time in question):

No property, taxed according to value, shall be so taxed in excess of one and one-half per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value. All bonds outstanding on the first day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds were outstanding on the first day of January, 1913, and all bonds issued for the world war compensation fund, shall be exempt from taxation, and, without limiting the general power, subject to the provisions of

Article I of this constitution, to determine the subjects and methods of taxation or exemptions, therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law. (113 O. L., 790.)

Article XII, Section 5, Constitution of Ohio:

No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.

Amendment XIV, Section 1, Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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SUPREME COURT OF THE UNITED STATES.

No. 658.—October Term, 1934.

Max Senior, Appellant,
vs.
George C. Braden, Quincy A. Davis, Carleton S. Dargusch, et al., &c.

Appeal from the Supreme Court of the State of Ohio.

[May 20, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

January 1, 1932—tax listing day—Sec. 5328-1, the Ohio General Code[1] provided that all investments and other intangible property of persons residing within the State should be subject to taxation. Section 5323 so defined "investment" as to include incorporeal rights of a pecuniary nature from which income is or may be derived, including equitable interests in land and rents and royalties divided into shares evidenced by transferable certificates. Section 5638 imposed upon productive investments a tax amounting to five percentum of their income yield; and Section 5389 defined "income yield" so as to include the aggregate income paid by the trustee to the holder, &c. Pertinent portions of Sections 5388 and 5389 are in the margin.[2]

[1]By Act of June 29, 1931 (114 Laws p. 714) providing for levy of taxes on intangible property etc., the Ohio General Assembly amended sections 5323, 5324, 5325, 5326, 5327, 5328, 5360, 5382, 5385, 5386, 5388, 5389 of the General Code and added supplemental sections 5325-1, 5328-1, and 5328-2.

[2]Sec. 5388. Excepting as herein otherwise provided, personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be. Deposits not taxed at the source shall be listed and assessed at the amount thereof in dollars on the day as of which they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day as of which they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money, on the day as of which such investments are required to be listed. . . .

Section 5389. As used in Section 5388 of the General Code and elsewhere in this chapter, the "true value in money" of any property means the usual

Appellant owned transferable certificates showing that he was beneficiary under seven separate declarations of trust, and entitled to stated portions of rents derived from specified parcels of land—some within Ohio, some without. On account of these beneficial interests he received $2,231.29 during 1931. The lands are adequately described in the margin.[1]

The tax officers of Hamilton County, where appellant resided, threatened to assess these beneficial interests, and then to collect a tax of five percentum of the income therefrom. To prevent this, he instituted suit in the Common Pleas Court. The petition asked that Section 5323, General Code, be declared unconstitutional and that appellees be restrained from taking the threatened action. The trial court granted relief as prayed; the Court of Appeals reversed and its action was approved by the Supreme Court.

With commendable frankness counsel admit that under the Fourteenth Amendment the State has "no power to tax land or interests in land situate beyond its borders; nor has it power to tax land or interests in land situate within the State in any other manner than by uniform rule according to value". Consequently, they say, "if the property of appellant, which the appellees seek to tax in this case, is land or interest in land situate within or without the State, their action is unconstitutional and should be permanently enjoined".

The validity of the tax under the Federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature. *Moffitt* v. *Kelly*, 218 U. S. 400, 404, 405; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625, 626; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 280. If the thing here sought to be subjected to taxation is really

selling price thereof at the time or times and place as of which it is required to be listed.

"Income yield" as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following: . . . in the case of equitable interests, the cash distributions of income so made."

[1] Lincoln Inn Court, Cincinnati, Ohio; Clark-Randolph Building Site, Chicago, Illinois; Woman's City Club, Cincinnati, Ohio; Rockefeller Building, Cleveland, Ohio; Insurance Exchange Building, Boston, Massachusetts; City National Bank Building, Omaha, Nebraska; and Fidelity Mortgage Company, Cleveland, Ohio.

an interest in land, then by concession the proposed tax is not permissible. The suggestion that the record discloses no federal question is without merit.

Three of the parcels of land lie outside Ohio; four within; they were severally conveyed to trustees. The declaration of trust relative to the Clark-Randolph Building Site, Chicago, is typical of those in respect of land beyond Ohio; the one covering East Sixth Street property, Cleveland, is typical of those where the land lies in Ohio, except Lincoln Inn Court, Cincinnati. Each parcel has been assessed for customary taxes in the name of legal owner or lessee according to local law, without deduction or diminution because of any interest claimed by appellee and others similarly situated.

The trust certificates severally declare—That Max Senior has purchased and paid for and is the owner of an undivided 340/1275ths interest in the Lincoln Inn Court property; that he is registered on the books of the Trustee as the owner of 5/3250ths of the equitable ownership and beneficial interest in the Clark Randolph Building site, Chicago; that he is the owner of 6/1050ths of the equitable ownership and beneficial interest in the East Sixth Street property, Cleveland. In each declaration the Trustee undertakes to hold and manage the property for the use and benefit of all certificate owners; to collect and distribute among them the rents; and in case of sale to make pro-rata distribution of the proceeds. While certificates and declarations vary in some details, they represent beneficial interests which, for present purposes, are not substantially unlike. Each trustee holds only one piece of land and is free from control by the beneficiaries. They are not joined with it in management. See *Hecht* v. *Malley*, 265 U. S. 144, 147.

The State maintains, that appellant's interest is "a species of intangible personal property consisting of a bundle of equitable choses in action because the provisions of the agreements and declarations of trust of record herein have indelibly and unequivocally stamped that character upon it by giving it all the qualities thereof for purposes of the management and control of the trusts. At the time the trusts were created, the interests of all the beneficiaries consisted merely of a congeries of rights etc., and such was the interest acquired by appellant when he became a party thereto. . . . The rights of the beneficiary consist merely of claims

against the various trustees to the pro rata distribution of income, during the continuance of the trusts, and to the pro rata distribution of the proceeds of a sale of the trust estates upon their termination".

Appellant submits that ownership of the trust certificate is evidence of his interest in the land, legal title to which the trustee holds. This view was definitely accepted by the Attorney General of Ohio in written opinions Nos. 3040 and 3869 (Opinions 1926, pp. 375, 428) wherein he cites pertinent declarations by the courts of Ohio and of other states. See also 2 Cincinnati Law Rev. 255.

The theory entertained by the Supreme Court concerning the nature of appellant's interests is not entirely clear. The following excerpts are from the headnotes of its opinion which in Ohio constitute the law of the case:—

> "Land trust certificates in the following trusts [the seven described above] are mere evidences of existing rights to participate in the net rentals of the real estate being administered by the respective trusts".
>
> "Ascribing to such certificates all possible virtue, the holder thereof is at best the owner of equitable interests in real estate divided into shares evidenced by transferable certificates. Sec. 5323, General Code (108 Ohio Laws 715) does not provide for a tax against the equitable interest in land but does provide a tax against the income derived from such equitable interests".

Apparently no opinion of any court definitely accepts the theory now advanced by appellees, but some writers do give it approval because of supposed consonance with general legal principles. The conflicting views are elaborated in articles by Professor Scott and Dean Stone in 17 Columbia Law Review (1917) at pp. 269 and 467.

Maguire v. *Trefry*, 253 U. S. 12, much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes from the securities (personalty) from which the income arose were held in trust at Philadelphia; income from securities taxable directly to the trustee was not within the statute. The opinion accepted and followed the doctrine of *Blackstone* v. *Miller*, 188 U. S. 189, and *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54. Those cases were disapproved by *Farmers Loan and Trust Co.* v. *Minnesota*, 280 U. S. 204. They are not in

harmony with *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, and views now accepted here in respect of double taxation. See *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *S. Carolina Tax Commission*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312.

In *Brown* v. *Fletcher*, 235 U. S. 589, 599, we had occasion to consider the claim that a beneficial interest in a trust estate amounts to a chose in action and is not an interest in the res, subject of the trust. Through Mr. Justice Lamar we there said:

> "If the trust estate consisted of land it would not be claimed that a deed conveying seven-tenths interest therein was a chose in action within the meaning of Sec. 24 of the Judicial Code. If the funds had been invested in tangible personal property, there is, as pointed out in the *Bushnell* case [*Bushnell* v. *Kennedy*, 9 Wall. 387, 393] nothing in Sec. 24 to prevent the holder by virtue of a bill of sale from suing for the 'recovery of the specific thing or damages for its wrongful caption or detention'. And if the funds had been converted into cash, it was still so far property—in fact, instead of in action—that the owner, so long as the money retained its earmarks could recover it or the property into which it can be traced, from those having notice of the trust. In either case, and whatever its form, trust property was held by the Trustee, not in opposition to the *cestui que* trust so as to give him a chose in action, but in possession for his benefit in accordance with the terms of the testator's will. . . .
>
> "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. *Ham* v. *Van Orden*, 84 N. Y. 257, 270; *Stringer* v. *Young, Trustee*, 191 N. Y. 157; *Lawrence* v. *Bayard*, 7 Paige 70; *Woodward* v. *Woodward*, 16 N. J. (Eq.) 83, 84. The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in